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Supreme Court of the United States

OCTOBER TERM, 1962

No. 20

W.M.C.A. INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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INDEX

	PAGE
Statutes Involved	2
Statement of the Case	3
Prior Proceedings	5
Proceedings Below	5
Opinions Below	6
Argument	8
Conclusion	22

CASES

Baker v. Carr, 369 U. S. 186 (1962)	5, 8, 11, 12, 13, 14, 18, 21
Caesar v. Williams, 371 P. 2d 241 (Idaho, 1962)	19
Carmichael v. Southern Coal Co., 301 U. S. 495 (1937)	21
Colegrove v. Green, 328 U. S. 549 (1946)	11
Everson v. Board of Education, 330 U. S. 1 (1947)	21
Frank v. Maryland, 359 U. S. 360 (1959)	19
General American Tank Car Corp. v. Day, 270 U. S. 367 (1926)	21
Kotch v. Board of Pilot Comm'rs, 330 U. S. 552 (1947)	20
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911)	13
MacDougall v. Green, 335 U. S. 281 (1948)	8, 11, 12
Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A. 2d 656 (1962)	20

PAGE

Maryland Comm. for Fair Representation v. Tawes, 31 U.S.L. Week 2155 (Md., Sept. 25, 1962) 20

McGowan v. Maryland, 366 U. S. 420 (1961) 20

Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580 (1935) 14

Morey v. Doud, 354 U. S. 457 (1957) 13, 14

Sobel v. Adams, No. 182-62-M-Civil-DD (S. D. Fla., Sept. 5, 1962) 19

United States v. Classic, 313 U. S. 299 (1941) 21

United States v. Saylor, 322 U. S. 385 (1944) 21

Wisconsin v. Zimmerman, Civil Action No. 3540 (W. D. Wis., Aug. 6, 1962) (memorandum decision of Special Master), *approved*, Aug. 24, 1962 20

W.M.C.A. v. Simon, 202 F. Supp. 741 (1962) 5

W.M.C.A. v. Simon, 370 U. S. 190 (1962) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

NEW YORK STATE CONSTITUTION

Article III 2, 21
Article IX 15
Article XIX 4, 9

28 U.S.C. § 1343 3

42 U.S.C. § 1983 3

New York County Law 15

Briefs

PAGE

Amicus Brief for the United States, *Baker* v. *Carr*.. 18

Jurisdictional Statement, *W.M.C.A.* v. *Simon* ..4, 6, 7, 8, 14, 19, 20, 22

Brief of Paul R. Screvane, et al., *W.M.C.A.* v. *Simon*..17, 21

Books and Pamphlets

David and Eisenberg, Devaluation of the Urban and Suburban Vote (1961) 19

Lewis, One Man—One Vote (1962) 22

Revised Record of the Constitutional Convention of 1894 (1900) 15, 17, 18

Newspaper

New York Times 5

Article

Lewis, "Legislative Apportionment and the Federal Courts," 71 Harv. L. Rev. 1057 (1958) 15

Supreme Court of the United States

OCTOBER TERM, 1962

No. 460

W.M.C.A. INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Attorney General and Secretary of State, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment

of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statutes Involved

The relevant state constitutional and statutory provisions are set forth in Appendix B of appellants' jurisdictional statement. We summarize them here briefly for the convenience of the Court.

The system for apportioning seats in both the State Senate and Assembly, is contained in N. Y. Const. art. III, §§ 2-5. While more than one Senate or Assembly District can be contained within the whole of a single county, and while a given Senate district may consist of more than one county, no county border line can be broken in the formation of either type of district.

The total number of Assemblymen is fixed at 150, with every county except Hamilton (which shares one Assemblyman with Fulton County) entitled to one Assemblyman. Sixty-one seats are thus accounted for. The remaining 89 seats, however, are apportioned in this manner: The citizen population of the State is divided by the total number of Assemblymen, and the quotient thus achieved becomes the "ratio." Every county whose citizen population equals 1½ times the "ratio" is entitled to a second Assemblyman. The rest of the seats are then apportioned among those counties with citizen populations greater than twice the "ratio." Seats apportioned on remainders are apportioned in order of highest remainders, with the proviso that no county shall have more Assemblymen than a county with a larger citizen population.

The Senate districts are created primarily on the basis of citizen population. A "ratio" is determined by dividing the citizen population of the State by 50 (the number

of Senators); Senate districts are then formed by combining or dividing counties so that each district contains approximately this number (the "ratio") of citizens. The Constitution provides that each district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as practicable. There are four further provisos: When any county is entitled to more than three Senators, the Senate is enlarged from its minimum size (50) by the number of these additional Senators; no county can have four or more Senators unless it has a full population ratio for each; no county shall have more than one third of all the Senators; and no two counties that are adjoining or separated by one public waterway shall have more than half of all the Senators. (The last two of these provisos are inoperative, since no counties are entitled to that number of Senators.)

The most recent redistricting pursuant to these provisions went into effect in 1954.

Statement of the Case

This is a class action for declaratory judgment and injunctive relief brought under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by the six individual appellants—residents of four of New York City's counties (Bronx, Kings, New York, Queens; the fifth, Richmond, is not represented), and of neighboring Nassau and Suffolk Counties—and W.M.C.A., Inc., a New York corporation. Appellees are officials of State and local government who perform duties relating to election of state legislative representatives, in accordance with the State statutes. The complaint alleged (par. 12) that the formula contained in the State Constitution for apportioning legislative seats (Congressional districting is not here challenged) violates the Fourteenth Amendment because it results in a "grossly unfair weighting of both houses in the State legislature in favor of the lesser populated rural areas of the State to the great

disadvantage of the densely populated urban centers of the State."

According to the 1960 census, the six counties represented by the six individual plaintiffs had a citizen population of 9,129,780, or 56.2% of the total citizen population of the State. They are represented by 72 Assemblymen and 28 Senators—48.0% of the Assembly and 48.3% of the Senate. When the legislature reapportions the State on the basis of the 1960 census figures, these same counties will have 26 Senate seats and 69 Assembly seats, 45.6% and 46.0%, respectively, of the two houses.

The ten most heavily populated counties in the State (Kings, Queens, New York, Bronx, Nassau, Erie, Westchester, Suffolk, Monroe and Onondaga) have, under the current apportionment, 38 Senate seats, 65.5% of all the Senate, and 93 Assembly seats, 62.0% of all the Assembly; when the Legislature reapportions New York on the basis of the 1960 census figures, these same counties will have 37 Senate seats and 93 Assembly seats, 64.9% and 61.3%, respectively, of the two houses. They have a citizen population of 11,937,406—73.5% of the total citizen population of the State.

Appellants claim (Jurisd. Statement, p. 8) that these statistics prove that New York "has deliberately chosen to create two classes of voters—rural and urban residents—and to assure, by virtue of a complex and arbitrary apportionment formula embodied in the state constitution—the political dominance of the rural class in both houses of the legislature."

The challenged formula was adopted in 1894 by a majority vote of the people of the State, pursuant to N. Y. Const. art. XIX, § 2. Under this provision, the People vote every twentieth year whether to call a constitutional convention; if a convention is called and amendments are proposed, the People are given an opportunity to vote on these proposals at an election held within six weeks

after the convention adjourns. In 1915 and 1938, the People rejected proposals by their constitutional conventions to amend the apportionment formula; and in 1916 and 1957, they voted against holding a constitutional convention. The 1957 rejection of a constitutional convention bears particular analysis because the issues were clear cut. Governor Harriman had urged that the People vote for a convention to revise the Constitution. He stated that the most urgent constitutional reform needed was "to elect one house of the legislature on the basis of population to give big cities fuller representation." New York Times, Sept. 7, 1957, p. 1, col. 8. See *id.*, Sept. 24, 1957, p. 29, col. 1; Oct. 29, 1957, p. 22, col. 5. Reapportionment was squarely at issue; yet the voters of New York rejected a convention by a vote of 1,368,063 to 1,242,568.

Prior Proceedings

The three-judge District Court, prior to this Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), unanimously granted appellees' motions to dismiss the complaint. 202 F. Supp. 741 (1962). On appeal, this Court held that the "well-established practice of a remand for consideration in the light of a subsequent decision" applied. 370 U. S. 190, 191 (1962). It therefore vacated the judgment of the District Court and remanded the case for reconsideration in light of the *Baker* decision, noting that "the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination." *Ibid.*

Proceedings Below

On remand, the District Court ordered appellees to answer or otherwise move with respect to the complaint by July 30th, and set the case down for hearing on August

1st. Appellees Simon, Lefkowitz, Berman and Leonard filed answers denying the material allegations of unconstitutionality. The remaining parties defendant, officials of New York City and Nassau County, admitted the allegations of the complaint and aligned themselves with appellants' position.

At the hearing, appellants introduced both oral testimony and documentary evidence as to the arithmetical application of the apportionment formula. They also offered to show (Jurisd. Statement, p. 6) that the apportionment formula was "specifically designed and intended' to curtail the representation of urban residents, that the "malapportioned" legislature discriminated against urban residents in allocating tax revenues and distributing benefits, and that a "consensus of expert opinion" holds that population is the only fair criterion for apportionment. These offers of proof were rejected by the Court. Both sides introduced a stipulation (R. 520-36) containing population statistics and the results of past, current and projected apportionments.

Opinions Below

After considering the evidence the three-judge District Court unanimously dismissed the complaint on the merits, holding that appellants failed to meet the burden of showing invidious discrimination.

Judge LEVET wrote the principal opinion of the Court. He first pointed out that New York's apportionment formula is far from arbitrary. New York gives primary weight to population (Jurisd. Statement, p. 16a) in both houses of the legislature. It departs from a strict population standard only in that (1) it guarantees each county at least one assemblyman (as does the Federal formula for apportioning members of the House of Representatives to the states), (2) it provides that densely populated counties,

already having three or more senators, may gain additional senators only on a full ratio, and (3) it provides that such additional senators are added to the total membership of the Senate so that they need not be taken from the less densely populated counties. Second, Judge LEVET noted the historic significance and importance of county government in New York and the emphasis in past apportionment formulas on preserving county representation in the legislature. He concluded that the present formula is "fitted to the nature of the governmental development of the Empire State" (Jurisd. Statement, p. 21a). Third, he emphasized that a majority of the People had refused to change this formula. In fact, they refused to convene a constitutional convention—in which the urban majority would have been in overwhelming control—despite the fact that advocates of a new apportionment system, including the then-governor of the State, urged them to do so. Fourth, Judge LEVET pointed out that the ten most populous counties in the State control both houses of the legislature; and he warned that senate and assembly districts, already oversized in the sparsely populated areas, would grow so large that there would be virtually no contact between legislator and constituent unless a strict population standard could be tempered by geographical considerations. Finally, he noted that a court must be especially conscious of traditional presumptions of constitutionality when it is dealing with basic provisions of a state constitution. He concluded, in light of these observations, that New York's legislative apportionment is free from constitutional taint.

Judges RYAN and WATERMAN concurred in Judge LEVET's findings and conclusions. Judge RYAN also wrote a separate opinion, in which he observed that the electorate could change the present system by convening a constitutional convention—but chose not to do so. He emphasized that although it is clear that the equal protection clause does not prevent a state from giving some con-

sideration to factors such as the interests of counties, geography, and concentration of political power, "all that plaintiffs have illustrated is that the apportionment is not based solely on population" (Jurisd. Statement, p. 26a).

Argument

Appellants claim that this appeal raises substantial questions for three reasons. First, they assert that the state here "has deliberately chosen to create two classes of voters—rural and urban residents—and to assure, by virtue of a complex and arbitrary apportionment formula embodied in the state constitution—the political dominance of the rural class in both houses of the legislature" (Jurisd. Statement, p. 8). Second, they maintain that "this case squarely presents the question whether a state may adopt a policy pursuant to which population is not controlling in determining the apportionment of either house of the state legislature" (Jurisd. Statement, p. 9). Finally, they argue that the District Court erroneously excluded their offers to prove that the delegates to the 1894 constitutional convention "intentionally" discriminated against urban residents, that the legislature unfairly allocates state taxes and revenues as a result of the alleged malapportionment, and that most "scholars" believe that the only legitimate basis of representation in a state legislature is population.

We submit that the District Court's decision, resolving each of these questions in favor of appellees, was correct beyond any doubt and that appellants' position is simply untenable. The first question—the allegation of rural dominance of the legislature—is belied by the very statistics on which appellants rest their case. The second—appellants' reliance on population as the sole test of apportionment—has been reduced to settled principle by *MacDougall* v. *Green*, 335 U. S. 281 (1948), whose validity was most recently reiterated in *Baker* v. *Carr*, 369 U. S.

186 (1962), and by every other relevant decision of this Court defining the scope of the equal protection clause. The third question—relating to the rejection of appellants' offer of proof—is utterly frivolous and flies in the face of existing law and reason.

(A)

Appellants have used many high-sounding phrases to indicate that the urban areas of the State have been injured by the New York apportionment formula. In fact, the entire basis of their action (Complaint, par. 12) is the claim that there is a "grossly unfair weighting of both houses of the State legislature in favor of the less populated rural areas of the State to the great disadvantage of the densely populated urban centers of the State." Their jurisdictional statement (p. 8) contains a remarkable reference to the "political dominance" of rural areas and an even more astonishing allusion to the "inability of the politically dominant rural minority to fully understand the problems of the urban majority." At a minimum, one would expect appellants to demonstrate that the urban areas of the State are unable to exert their political power in the legislature or that they are foreclosed from any opportunity to change the constitutional formula itself. Yet, the figures clearly demonstrate that the urban areas of New York State are now and will continue to be in effective control of the legislature. Moreover, the large urban majorities have had an ample opportunity to assemble a constitutional convention (N. Y. Const. art. XIX, § 2) to repeal the present apportionment formula and to substitute another formula; this they have repeatedly refused to do.

The urban counties—supposedly the victims of a pattern of discrimination—control the legislature. It is indeed a feeble pattern of discrimination that results in the "victim" being able to out-vote the "oppressor." But that is exactly what the statistics show. We reiterate them:

the ten most heavily populated counties in the State, have, under the current apportionment, 38 Senate seats, 65.5% of all the Senate, and 93 Assembly seats, 62.0% of all the Assembly; when the Legislature reapportions New York on the basis of the 1960 census figures, these same counties will have 37 Senate seats and 93 Assembly seats, 64.9% and 61.3%, respectively, of the two houses.

Appellants failed to show why counties represented by almost two-thirds of the State Legislature are the victims of "a grossly unfair weighting" to the "gross disadvantage of the densely populated urban centers." To do so, they must resort to a strictly arithmetical standard; we submit that such a standard is utterly unworkable and has been rejected by a century of equal protection decisions.

Before we turn to appellants' flirtations with mathematical exactitude, we wish to emphasize again that urban residents not only control the legislature but they also control the machinery for changing the apportionment formula itself. Since 1894, when the People adopted this formula, they have refused repeatedly to alter it. In 1915 and 1938, they rejected proposals to amend the formula; in 1916 and 1957, they voted not to convene a constitutional convention. We have already pointed out that this formula was squarely at issue in the 1957 election.

The essence of appellants' complaint is that urban residents are underrepresented in the legislature, and therefore are unable to assert their political power in the councils of the State. Yet, even if the majority were suppressed in the legislature—and the facts demonstrate that it is not—it was hardly suppressed in the 1957 election. According to the 1960 census, the six counties represented by the six individual plaintiffs had a citizen population of 9,129,780 or 56.2% of the total state population. The 10 most heavily populated counties—presumably those most heavily discriminated against—had a population of 11,937,406 or 73.5% of the citizen population of the State. Thus, the

majority had every opportunity to convene a constitutional convention; and it chose not to do so.

One can hardly complain that the urban majorities have been deprived of political power by a state constitution when these majorities are able to assert their political weight at the polls to amend that constitution. The availability of a political remedy negates plaintiffs' complaint that they have been deprived of equal protection of the laws and, in any event, it relieves the "compelling circumstances" calling for the intervention of federal equity power. *Baker* v. *Carr, supra* at 233; *Colegrove* v. *Green*, 328 U. S. 549, 565, 566, note 6 (RUTLEDGE, J., concurring) (1946). This Court recognized in *Baker* that the federal courts should intervene in this delicate area only where the majority of the people of the State have no practical opportunity for asserting their political weight at the polls. 369 U. S. at 251, 258-59 (CLARK, J., concurring); see *id.* at 193 n. 14.

Significantly, appellants themselves felt compelled to allege (Complaint, par. 20) that they had no political remedy. That allegation is completely contrary to fact.

(B)

As we have already observed, appellants must resort to a strict population standard in order to prevail; in no other way can they establish that New York's minimal variations from this single standard constitutes an invidious discrimination against the more populous counties. We submit that the equal protection clause makes no such demands on the states.

If there was ever any doubt that previous cases had decided—on the merits—that a state may "assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses" (*MacDougall* v. *Green*, 335 U. S. 281, 284 [1948]) by grant-

ing the small counties somewhat greater representation in the state legislature than they would have if population were the only criterion for apportionment, this Court dispelled that doubt in its *Baker* opinion. That opinion (369 U. S. at 203) pointed out that *MacDougall* v. *Green, supra,* affirmed on the merits Illinois' right to require that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties.

In *MacDougall,* this Court stated that (335 U. S. at 283-84):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange, indeed, and doctrinaire, for this court, applying such broad Constitutional concepts as due process and equal protection of the laws, to deny a state the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

This Court, in *Baker,* made it crystal clear that population is not the only criterion for apportionment. In fact, although the Court took great pains to avoid discussing the merits of the *Baker* complaint (369 U. S. at 197), five justices nevertheless pointed out that it was appropriate for a state to use factors other than population in apportioning its legislature. 369 U. S. at 244-45, 258, 266, 279, 323, 334, 336, 341.

These opinions merely echo the long standing rules that surround the equal protection clause.* Appellants' approach stands in sharp contrast with the classic statement of the Court on the scope of the equal protection clause, found in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911), lately re-emphasized in *Morey* v. *Doud*, 354 U. S. 457, 463-64 (1957):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest

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* The term "invidious discrimination" is nothing more than a shorthand way of describing the kind of arbitrary classification which violates the equal protection clause. It has a well established meaning in the history of the equal protection clause. See *Baker* v. *Carr*, *supra* at 244-45 (DOUGLAS, J., concurring).

upon any reasonable basis, but is essentially arbitrary."

What else but "mathematical nicety" is required by plaintiffs' contention that malapportionment is a function only of population figures? As we noted above, the six counties represented by the six individual plaintiffs have 56.2% of the total citizen population of the State and are represented by 48.0% of the Assembly and 48.3% of the Senate; when the legislature is reapportioned on the basis of 1960 census figures, they will have 45.6% and 46.0%, respectively, of the two houses.

In a variation of their basic theme, appellants argue (Jurisd. Statement, p. 11) that the burden of justifying apportionment falls on appellees upon mere statistical demonstration of a disparity between New York's apportionment system and a system based solely upon population. This is completely erroneous. Appellants' burden under the equal protection clause is to show that New York's formula "does not rest upon any reasonable basis, but is essentially arbitrary." *Morey* v. *Doud, supra* at 464. See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584 (1935). There is no doubt but that factors other than population constitute ingredients of a reasonable apportionment system—and there is no reason at all to shift the burden of proof to defendants just because there is some variation between a pure population standard and the New York formula. Appellants' theory proves too much; under it, they would likewise succeed in making a prima facie case on the barest statistical showing in virtually every state of the union. See *Baker* v. *Carr, supra*, 369 U. S. at 319 (FRANKFURTER, J., dissenting). For almost every state departs from a strict population standard—and for very good reasons too. There is no reason to suspect unconstitutionality from a commonplace.

We do not contend that the New York formula for apportioning legislators is now or ever was intended to be

based solely upon the population standard. It is obvious to even the most casual observer that the formula combines the population factor with three other basic criteria—all of which plaintiff must show to be irrational. We shall discuss each of these criteria briefly.

1. *Community of Interest.* New York State is composed of 62 counties, each of which plays an important part in the State government. See N.Y. Const. art. IX; County Law, *passim.* This role is increasing in importance. See County Law Art. 6-A. Each of the county's functions brings it into intimate contact with the legislature. To effectively perform its functions, the county needs a representative in the legislature who can represent its interests and bring its needs to the attention of the entire body. See Lewis, "Legislative Apportionment and the Federal Courts," 71 Harv. L. Rev. 1057 n. 3. The extremely irregular population density in New York State makes it particularly necessary that each county be given one representative. Otherwise, the less densely populated counties would be grouped together in multi-county districts in which the legislator's function as a liaison between the county and state government would virtually disappear.

The provision of the New York apportionment formula which most obviously meets this need is that which guarantees at least one assemblyman to each county. However, the two major provisions dealing with senatorial apportionment, the "full ratio rule" and the provision for enlarging the Senate, also tend towards this goal, since they allow many of the less populated counties to have their own senator and restrict the size of multi-county senatorial districts.

This rationale represents a deeply felt need both now and at the time of the 1894 Constitutional Convention; it is by no means a litigator's after-thought. See, *e.g.*, *Re-*

vised Record of the Constitutional Convention of 1894, vol. 3, pp. 1223-26 (1900).

2. *Geographical Considerations.* The six counties in which plaintiffs in this lawsuit reside contain 56.2% of the citizen population of the State, but they constitute only 3.1% of its area. Four of them—Bronx, Kings, New York, and Queens—make up, along with Richmond (not involved in this suit) New York City; these are the smallest counties in this State. The other two, Nassau and Suffolk, are part of New York City's metropolitan area. Nassau has the ninth smallest area of the State's 62 counties. Suffolk, alone of the six counties here represented, has a fairly large area; its "under-representation" in the Legislature is explained not only by its identification with the metropolitan area but also by its sudden population growth—from 1950 to 1960, its population went up 141% as compared with a population rise of 13.2% for the State as a whole (Figures from decennial census of 1950 and 1960).

It is obvious that the assemblyman from St. Lawrence County, which covers 2,767 square miles, an area larger than the State of Delaware, although he represents comparatively few people, represents a constituency that spans an extremely large geographical area; and the senator from the 40th Senatorial District, which includes St. Lawrence as well as Clinton and Franklin Counties, represents an area totalling 5,511 square miles, larger than the State of Connecticut. If a strict population standard were adopted in either house, it would necessitate one of two courses of events, neither of which is conducive to a representative democracy—either the Legislature would grow so large that effective discussion would come to a standstill, or the districts would grow so large as to make the legislator and his constituents inaccessible to one another.

Again, all three of the major provisions* of the apportionment formula here attacked are an attempt to satisfy the need for geographical distribution of legislators. Although the provision which most directly meets this is the provision for enlarging the Senate, the other provisions of course also tend in that direction. And this is no accident; by 1894, the Constitutional Convention already heard complaints that the area of a rural Senate District had become so large that a senator could not properly represent all of the people of his district. *Revised Record, op. cit.*, pp. 1210-11. Accessibility was then and continues to be a vital factor in effective democracy. Unfortunately, it is one which appellants completely ignore.

3. *Anti-Concentration.* One of the strongest advocates of the *Baker* decision, the Solicitor General of the United States, has pointed out that:

> "Constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a conflict between two

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*In addition to the three basic provisions of the New York formula here discussed, other minor features relating solely to the Assembly are raised in the brief filed in support of appellants' position (pp. 14-17) by the New York City officials. These points are not covered by the pleadings or by the record. In any event, the points are unsubstantial. The provision requiring assembly districts to be contained within senate districts is an obviously justifiable attempt to curb gerrymandering by local authorities (who draw assembly district lines) and also to coordinate the constituencies of the two houses. The provision giving a second assemblyman to counties having over 1½ times the "ratio" allows a fairly populous county—with not quite two ratios—to gain greater representation than the very sparsely populated counties which have one assemblyman but which may fall far short of achieving one full ratio.

parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard.

"Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by a strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas." Amicus Brief for the United States, *Baker* v. *Carr*, pp. 29-30.

The Constitutional Convention, in its address to the People, frankly noted its concern over this problem—one which is particularly felt in New York State, where the six counties represented by the six individual plaintiffs in this lawsuit constitute a single metropolitan area. It asked:

"What will be the consequence of compelling the vast region from the city of New York to St. Lawrence and to Lake Erie, with its varied interests, sentiments and opinions not over well understood by the inhabitants of the city, to submit to such domination? Would such an arrangement conduce to the permanent welfare of the State?" *Revised Record, op. cit.*, vol. 4, p. 1255.

It noted, too, that "the advantage is still greatly on the side of the city as against the country districts on account of their small territory, and the fact that all of their representatives stand for the entire city." *Ibid.*

This is no idle fear. The interests of the upstate counties may in some instances be opposed to that of the New York City metropolitan area. Or, more often, their vital inter-

ests may be of little concern to the residents of the City's metropolitan area. What of the remaining 97% of the State's area? Again, effective democracy requires a pragmatic approach, not an "all or nothing" standard; the New York formula, particularly the "full ratio" provision, attempts to supply the necessay flexibility to meet the threat of undue concentration of power.

These three basic considerations—and many others—have been met by the New York apportionment formula. Their existence has prompted the People of the State to retain this formula in their constitution since 1894. Although appellants argue (Jurisd. Statement, pp. 12-13) that the historic significance of these provisions is of no moment, there is substantial authority to the contrary. See, *e.g.*, *Frank* v. *Maryland*, 359 U. S. 360, 370-71 (1959). In any event, the longevity of the formula at least demonstrates that it is responsive to basic needs in New York, and is not a sinister product of an anti-urban cabal, as appellants intimate.

It is to be noted, too, that each of these three basic considerations apply to both houses of a bicameral legislature. If it is rational to have one house based mainly upon population and a second house based completely upon other considerations, as in the Federal model, it is equally rational to combine both factors in each of the two houses —and it is *a fortiori* rational to base both houses mainly upon population with slight variations to take account of other interests. New York follows the last of these alternatives. Although appellants suggest that some of the post-*Baker* lower court decisions conflict with this view (Jurisd. Statement, p. 9), all of the cited cases concern apportionments which diverge from a population standard far more widely than does New York. See DAVID AND EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 5 (1961). In fact, the existing case law on apportionment amply supports our position. See *Sobel* v. *Adams*, No. 182-62-M-Civil-DD (S. D. Fla., Sept. 5, 1962); *Caesar* v.

Williams, 371 P. 2d 241 (Idaho, 1962); *Maryland Comm. for Fair Representation* v. *Tawes*, 31 U.S.L. Week 2155 (Md., Sept. 25, 1962);* *Wisconsin* v. *Zimmerman*, Civil Action No. 3540 (W. D. Wis., Aug. 6, 1962) (memorandum opinion of Special Master), *approved*, Aug. 24, 1962. And, most important, every relevant equal protection decision by this Court cries out against the "mathematical nicety" and lack of flexibility inherent in appellants' argument.

(C)

Appellants also object to the Districts Court's rejection of their offers of proof. These offers fall into three categories; we shall examine them seriatim.

First, they offered to show that the delegates to the 1894 constitutional convention "intentionally" discriminated against urban voters because (Jurisd. Statement, p. 12) they thought such voters "were inferior and unworthy of an equal voice in state government." It is strange, indeed, that appellants feel compelled to psychoanalyze the motives and beliefs of the 1894 Constitutional Convention. This unsupported foray into legislative motive—attempting to taint the Convention with a kind of legislative *mens rea*—imagines a single "motive" for a large deliberative body; and that imagination is completely without support in reality and in law. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs*, 330 U. S. 552 (1947). Even more fundamental to this case, an inquiry into legislative motive is hardly necessary. We do not contend that the New York apportionment formula was intended to be based solely upon a population standard; the carefully

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* The prior case of this name, decided in April and reported at 228 Md. 412, 180 A. 2d 656 (1962), does not—contrary to appellants' assertion—support their view. It holds only that there must be a "reasonable relation" to population in one house of a bicameral legislature. 180 A. 2d at 668.

prepared provisions of N. Y. Const. art. III §§ 2-5, are by no means an accident. Appellants' offer was both incompetent and irrelevant, and it properly was excluded.

Second, they offered to show that the legislature, as a result of its claimed pro-rural bias, discriminated against the urban areas in imposing taxes and in distributing revenues.* This offer, too, was properly excluded. One need not attack the history of state legislation in order to establish his standing to assert a claim of invidiously discriminatory legislative apportionment. *Baker* v. *Carr, supra,* held that citizens have a "plain, direct, and adequate interest in maintaining the effectiveness of their votes." 369 U. S. at 208. See *United States* v. *Classic,* 313 U. S. 299 (1941); *United States* v. *Saylor,* 322 U. S. 385 (1944). And it adds nothing to plaintiffs' case to launch a wholesale attack on the wisdom of past legislation. If a legislature passes an unconstitutional act, one need not claim malapportionment in order to strike down the act; on the other hand, if the legislature acts constitutionally, one cannot show malapportionment by asserting his grievances at the legislature's actions. Appellants' reliance on footnote 15 of the *Baker* decision is somewhat tenuous; if anything, the Court there indicated grave doubt as to whether the taxation arguments "could add anything however presented," and it left the question open only because it did not have to reach it. Moreover, it has long been established that the Constitution does not regulate the allocation of taxes or revenues among a state's subdivisions. *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 372 (1926); *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 521-23 (1937); *Everson* v. *Board of Education,* 330 U. S. 1, 5-8 (1947).

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* The New York City officials made a similar offer. Their contention (Br., p. 2 fn.) that their allegations were broader in this respect are not borne out by the record. See transcript, p. 42.

Finally, appellants offered to prove that a "consensus" of scholarly opinion (Jurisd. Statement, p. 22) supports the view that population is the only legitimate criterion to be used in legislative apportionment. Obviously, the "legitimacy" of any apportionment under the equal protection clause is a question for the Courts; they alone are "experts" on constitutional law. It is interesting to note, however, that a "consensus" has yet to be reached. The very pamphlet filed with this Court by appellants—LEWIS, ONE MAN—ONE VOTE (1962)—contains a brilliant dissent by Professor Alfred de Grazia which points out (especially at point 1) the fallacies underlying appellants' theories.

CONCLUSION

This appeal presents no substantial question. The United States District Court correctly determined the issues on the merits in accord with *Baker* v. *Carr* and other relevant decisions of this Court. Therefore, the judgment should be affirmed or the appeal dismissed.

Dated: New York, N. Y., October 23, 1962.

Respectfully submitted,

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